No. 88-810

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

DISTRICT OF COLUMBIA,
Petitioner,

v.

DONALD R. PARKER,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the trial court committed reversible error when it declined to instruct the jury that a police officer may use deadly force to apprehend a person suspected of a crime of violence when the instruction had no application to the evidence in this case and did not in any event accurately reflect the holding of *Tennessee v. Garner*, 471 U.S. 1 (1985).

2. Whether the District of Columbia preserved, under Federal Rule of Civil Procedure 51, its objection to the trial court's refusal to give its proposed instruction purportedly based upon *Garner*, and whether this Court should review the application of Rule 51 by the Court of Appeals.

3. Whether this Court should review the sufficiency of the evidence supporting the verdict, where the trial and appellate courts have reviewed that evidence four times and found it ample, where the legal foundation for that verdict is entirely consistent with this Court's decisions in *Monell v. Department of Social Services of the City of New York*, 436 U.S. 658 (1978), and *City of Oklahoma City v. Tuttle*, 471 U.S. 808 (1985), and where the District of Columbia did not object to jury instructions based upon those decisions.

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RESPONDENT'S BRIEF IN OPPOSITION

The respondent Donald R. Parker respectfully requests that this Court deny the petition for writ of certiorari seeking review of the opinion of the United States Court of Appeals for the District of Columbia Circuit in this case. That opinion is reported at 850 F.2d 708 (D.C. Cir. 1988).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fourth Amendment to the United States Constitution provides, in relevant part: "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated . . ." U.S. Const. amend. IV.

42 U.S.C. § 1983 provides in relevant part: "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of . . . the District of Columbia,

subjects, or causes to be subjected, any citizen of the United States . . . to the deprivation of any rights . . . secured by the Constitution and laws, shall be liable to the party injured in an action at law. . ."

STATEMENT OF THE CASE

Introduction

As the Court of Appeals observed, this was a "fact-bound case" [Appendix to Petition for Writ of Certiorari (App.) at 13a]. Petitioner District of Columbia persists here, as it did in the Court of Appeals, in relying largely upon its own evidence. It repeatedly characterizes its evidence as "uncontradicted"[1] when the contrary is true and dismisses or ignores vast portions of the record.[2] Respondent fundamentally disagrees, as did the trial judge, and two of the three judges on the appellate panel, with petitioner's suggestion that the jury was erroneously induced to apply a standard for the use of deadly force inconsistent with applicable law. To the contrary, the jury was clearly and rigorously instructed on Parker's burden to establish that he was injured by the use of deadly force unreasonable under the circumstances and that the District of Columbia was directly and not vicariously responsible. The evidence, viewed in the appropriate perspective of the plaintiff, provides an overwhelming basis for the conclusion that Parker met that burden.

The Facts

On November 15, 1982, William Hayes fired four shots at Donald Parker from a distance of ten to fifteen feet. Two of the shots entered Parker's body and one lodged in the spine, paralyzing him from the waist down. Parker

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[1] *E.g.*, Petition for Writ of Certiorari (Petition) at 5, 6, and 27.

[2] *See, e.g.*, the trial assistant's clear statement to the trial judge that the District of Columbia was not relying on the "fleeing felon" rule to justify the shooting. (Tr. 1488-89, discussed *infra* at 20.)

was unarmed and his arms were upraised. Both hands were visible. (Tr. 218, 1288-89, 1303-05.)

Hayes claimed he shot Parker because he believed Parker was armed at the time he fired and that Parker was about to shoot him. Parker was not fleeing at the time of the shooting, and neither Hayes nor the District of Columbia defended the shooting as necessary to prevent Parker's flight.[3]

The shooting occurred on a suburban road in Prince George's County, Maryland. Hayes, and his partner Ronald Motley, were members of a recently created unit of the District of Columbia Metropolitan Police Department called the Repeat Offender Project, or "ROP" unit. They had been dispatched to the area by the ROP unit to locate and apprehend Parker, who was the subject of a District of Columbia arrest warrant for armed robbery.[4]

Parker filed suit against the District of Columbia alleging that it had violated his constitutional rights and was liable for the resulting damage under 42 U.S.C. § 1983. At trial, he presented an array of testimonial and documentary evidence dealing with the creation and operation of the ROP unit, training, supervision, control, and discipline of its members, including officer Hayes, and the events of the day of the shooting.

The evidence demonstrated that the District of Columbia created the ROP unit, selected its members, and sent them on missions with full awareness that ROP members would encounter citizens in situations with a high likelihood of volatility. The evidence also demonstrated that the District of Columbia provided woefully inadequate tools for handling these situations, which present danger to officer and citizen alike, and which are highly predictable but confusing to the ordinary officer. It com-

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[3] *See* discussion, *infra* at 19-20.

[4] All charges against Parker were later dismissed when four witnesses to the robbery failed to identify him (Tr. 930-34).

pounded the inevitability of violence by imbuing the ROP squad members with the notion that they were not to seek guidance when they encountered difficult situations, but were to *ad lib* their responses to meet their objective. The jury was amply justified in concluding that the District of Columbia was responsible for Parker's injuries.

Two acknowledged experts in matters of police administration and practice, particularly as regards proper training, procedures, and control in volatile extra-jurisdictional investigations, explained why that was so. One was Roy C. McLaren, former Director of Field Operations for the International Association of Chiefs of Police, Chief of Police for Arlington County, Virginia, member of the Police Chiefs Steering Committee for the Washington Metropolitan Area, Director of the Law Enforcement Standards Division of the Police Executive Research Forum, and coauthor (with the late Orlando W. Wilson, Superintendent of Police in Chicago) of the landmark treatise, *Police Administration*, perhaps the most widely used book on police management in the United States. (Tr. 665-72.)

Another was Charles W. Bates, a retired 36-year FBI agent formerly in charge of field offices in Omaha, Cleveland, Chicago, and San Francisco, and Assistant Director in charge of criminal investigations at FBI headquarters in Washington, D.C. Bates had made at least 500 arrests during his career, including numerous arrests of armed and dangerous felons. He was responsible for the entire supervision of the 1974 Patricia Hearst kidnapping case. Bates had particular expertise in the area of civil rights violations by local police departments and when it was appropriate for local police to use deadly force. (Tr. 263-79.)

The experts explained, and the jury was entitled to accept, that the ROP squad's "live by your wits" ethic was at odds with the norm for law enforcement conduct. It was especially dangerous when combined with the ROP's

failure to provide its freelancing members with confrontational tools that involved less than deadly force and the failure to instruct members in the normal kinds of non-deadly force and disarmament tactics. The absence of command and control of ROP squad officers in extra-jurisdictional forays, combined with the failure adequately to train them in non-deadly confrontational techniques, was a prescription for and the cause of the very disaster that occurred on November 15, 1982.

The Shooting

On November 15, 1982, Hayes and Motley confronted Parker and his family within their home,[5] claiming to be police officers from the District of Columbia. They had no warrant. Throughout the course of their discussions with Parker and during the events leading up to the shooting, they never told him he was under arrest. They did not know what their authority was. They were unaccompanied by local police. They refused to contact local police and were unable or unwilling to contact their own superiors. They refused the family's requests in all of these regards. (Tr. 434, 435-36, 544, 991.) The officers behaved both boorishly and uncertainly. They alternately threatened and cajoled. They tried to trick Parker into leaving voluntarily. (Tr. 378.) Hayes was menacing, displayed his weapon, and behaved aggressively. Motley was inclined to leave until authority appeared. (Tr. 433, 434, 991-93.) The Parkers, dressed in underwear and night clothes and having two small children at their feet, were frantic.

Frightened and panicked, Parker left his house through the bedroom window and alternately walked and ran through a nearby wooded area, followed by Motley. He

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[5] Hayes and Motley contended they had been told Parker would not be there because he and his wife were estranged (Tr. 327-28, 1743-44). That was obviously inaccurate information, as was the address they had been given in Washington for Parker's current residence, a shopping mall (Tr. 1743-44).

wanted to go to a neighbor's home to call a lawyer.[6] He decided to get on a public road, where he unexpectedly met Hayes. He tried to enter a vehicle which had rear-ended Hayes' car. According to the driver he screamed, "Help me. These people are trying to kill me." (Tr. 437-41, 888-90.)

Hayes unsuccessfully attempted to pull Parker from the car. With Parker partially out, between the opened door and the body of the car, Hayes backed up and assumed a protective position near the rear of the car. Hayes said to Parker "Freeze, Parker; don't do it." (Tr. 197-200.) Parker attempted to comply.

Overweight, undertrained, outside the command and control of his supervisors in the District of Columbia, uncertain of his arrest authority, incapable of subduing Parker by nondeadly force, unaccompanied by uniformed Maryland officers, Hayes then fired four bullets at Parker from his service revolver, hitting him twice (Tr. 202). Neither Hayes nor Motley had seen Parker in possession of a weapon at any time that day. Parker was in fact unarmed. (Tr. 218.)

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[6] Parker described his conduct as follows:

> THE WITNESS: Yes, Officer Hayes. Officer Hayes kept grabbing his gun, he kept grabbing at his gun. He frightened me with his gun, basically, as far as I'm concerned, and he scared me to the point whereas I went into the bedroom, I told my wife, I say, "I don't know who this fellow is, or these people are." I say, "They don't have a warrant or anything." I say, "I'm getting out of here. I'm getting out of here."
>
> Before I went into the bedroom, I beg Officer Hayes could she, my wife, go and call my lawyer also, before I done that. They refused everything. They refused everything. They wouldn't allow us to do anything. They just simply just came into my house and ramshacked it and took it over.
>
> I went into the bedroom. I told my wife, I say, "I'm scared, sugar, real frightened. I don't know who these guys are, what they are." I say, "I'm going to try to go over to the neighbor's house and call the attorneys. And that's what occurred."

(Tr. 435-36.)

Dr. William Brownlee, formerly the Deputy Medical Examiner and Deputy Coroner for the District of Columbia, testified for Parker. Using photographs and medical records, Dr. Brownlee did a forensic reconstruction of the shooting, including in particular the angle of Parker's body when Hayes fired the shot which lodged at the L-2 level in Parker's spine. Dr. Brownlee testified that when Hayes fired this shot, Parker's arms were in a raised position and that the front of Parker's body was as visible to Hayes, if not more so, than the rear of Parker's body. (Tr. 1304-05.)

The Absence of Supervision, Command and Control

Inspector Edward J. Spurlock, creator and head of the ROP squad, conceded that the practice and custom of the squad was essentially to freelance in the field. Squad members were encouraged to use their wits. They were not expected to check with their superiors upon encountering problems. (Tr. 1633, 1639, 1640.) Spurlock also testified, as had Hayes, and the District conceded throughout trial, that ROP members were expected to operate outside the District of Columbia, where squad members would roam to make surveillances, gather information or make arrests. These were not to be ordinary forays. The ROP squad was intended to target individuals who purportedly were wanted for crimes of violence. The nature of these "targets" gave to every confrontation a potential volatility. (Tr. 1597-1600.)

Chief McLaren testified that in these extra-jurisdictional circumstances, the need for direction, supervision and control of officers in the field was paramount. Freelancing is dangerous. McLaren described in detail the norms that a police department is expected to meet in these circumstances. Officers must have appropriate levels and forms of response that are clearly defined and understood well in advance. They must have clear direction from their superiors and a clear understanding of the extent and limits of their authority. They must be told

when and how they may "detain" and under what circumstances they may "arrest." Precision and clarity are required to avoid confusing the officers and to avoid misunderstanding and confusion on the part of those citizens whom they confront. (Tr. 672-73, 676-84, 727-31.)

McLaren analyzed the sole written guidance provided ROP squad members regarding response levels and authority in extra-jurisdictional confrontations: a single, confusing and poorly written memorandum purporting to describe authority to arrest in Maryland, plaintiff's exhibit 4. Hayes and Motley did not understand it. (Tr. 338-39.) Assistant United States Attorney William Bowman conceded that it was "silent" on the key question of what authority a D.C. officer had to arrest in Maryland for a felony committed out of his presence (Tr. 1341). The memorandum was inadequate as a supervisory tool. It failed to cover extra-jurisdictional "detention" situations, failed to give instructions on the need to maintain contact, failed to give a clear explanation of arrest authority, and failed otherwise clearly to delineate the responsibilities of an officer in the kind of extra-jurisdictional confrontation experienced by Hayes and Motley on November 15, 1982. Oral instructions were not a substitute, in McLaren's view. Only by written guidance through clear manuals does an officer remember what he is told. The norm in police practice—the minimum norm —requires clear and adequate written instructional and supervisory material. The District failed to meet that norm as regards extra-jurisdictional arrest and detention by its ROP squad members. (Tr. 678, 679, 681, 682, 727, 728.)

McLaren's opinions were illustrated by the very testimony of the officers. Officer Motley admitted that he was confused about his authority to arrest or detain Parker. He knew he had "citizen's arrest powers." He just did not know what they were. Nothing in the memorandum, or any other training guide, helped him. (Tr. 315, 316, 338, 339.) Motley and Hayes simply did not know what

to do in the Parker house. They had no command presence, and they never placed Parker under arrest. So far as Hayes was concerned, Parker believed he was free to leave and he was never told not to. (Tr. 1858-60.) By the same token, however, Hayes and Motley felt constrained to follow Parker in menacing and threatening fashion in an effort to do something. It was an absolutely contradictory pattern of response, neither fish nor fowl, in which Parker could not know whether he was detained or free to go.

Moreover, again in violation of the minimum standards for command and control of far-flung police intrusions, neither Hayes nor Motley was ever instructed that, upon encountering a wanted suspect in a far-flung jurisdiction, even if unexpectedly, he must immediately contact local authorities in order to utilize their command authority. McLaren testified that these policies and instructional elements were critical; telephone contact with District of Columbia authorities and with Prince George's authorities should have been made as soon as Parker was identified, from any location nearby. (Tr. 684,731.)

McLaren described the predictable mayhem, the volatility, that such untrained and uncontrolled officers create when they engage in extra-jurisdictional maneuvers. They possess no command presence, create uncertainty and confusion in those whom they attempt to confront, and are themselves uncertain and confused about their proper responses. This volatility is engendered by the "use your wits" credo which the ROP squad substituted for training, command, and control. It results in the predictable panic which Parker felt, the uncertainty and confusion which attended the officers' responses, and the unwieldy and ultimately excessive force to which Parker was subjected. (Tr. 682-84.)

The Absence of Training in Nondeadly Confrontational Techniques

Both experts testified at length about the inadequate training which Officer Hayes received in nondeadly tech-

niques of disarmament and control.[7] Such training was particularly necessary for a ROP squad officer engaged in volatile extra-jurisdictional confrontations.

Hayes himself conceded that he received no more than an hour of training as a police cadet in 1973 in how to disarm dangerous individuals. In fact, that is all the disarmament training he received during the entire 1971-1978 period. (Tr. 231, 233.) Hayes thought so little of the training, which was "less than they taught you in the Air Force," that he characterized it as "next to nothing." (Tr. 231, 233.) After 1978, he received none (Tr. 233-34). After selection to the ROP squad, he received no physical training despite the fact that he had spent virtually all of the preceding five years as a radio dispatcher (Tr. 228-30). He had been on limited duty because of a bout with pericarditis in 1977 and a desire to avoid heavy street duty. Following his admission to the ROP squad in the spring of 1982, Hayes was not required to take any refresher physical training. Hayes had been cited numerous times for being overweight. (Tr. 1624-25.) On July 16, 1982, he fractured his shoulder. He was off duty until September. (Tr. 228-30, 257, 1625.) In this unfit and unprepared condition, Hayes was sent to Maryland to look for Parker. Spurlock conceded that he was aware of Hayes' health problems and general level of fitness when he selected Hayes to the ROP squad (Tr. 1623-24).

Assistant United States Attorney Bowman testified that to his knowledge, physical condition was not a criterion for selection to the ROP squad, but that upon reflection perhaps it should have been. He stated, "I thought that most of the surveillance, frankly, was going to be by car." (Tr. 1334.)

McLaren and Bates both testified that the training and physical preparedness given Hayes by the ROP squad

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[7] Both had reviewed the training materials provided by the District of Columbia and the depositions of Hayes, Motley and Spurlock (Tr. 271, 676).

and the Metropolitan Police Department were inadequate. McLaren described an array of disarming tactics that police officers should reasonably be taught. He described a variety of methods that police departments reasonably should teach their officers for removing individuals from automobiles. McLaren described those methods in detail, including a bar-arm lock, a bar-arm lever, and others. (Tr. 693-94.) These techniques were not taught Hayes, and Hayes did not try to use them. McLaren further testified that the words purportedly spoken by Hayes, including the word "freeze" were inadequate. This command and the other command which Hayes asserted that he spoke ("don't do it") would be understood differently by a person who was unarmed than one who was in fact armed. The unarmed person could be expected to respond as Parker did. Hayes should have ordered Parker to place his hands so that Hayes could see them. This is the correct command to avoid confusion. Nothing in the materials that McLaren reviewed suggested that Hayes or his partner had ever received training in these principles. (Tr. 695, 696.)

Bates testified to the same effect. Hayes was not justified in using deadly force against Parker. Hayes had a substantial size advantage over Parker, and he could have removed Parker from the vehicle without having to fire his weapon. (Tr. 281-82.) Bates gave a demonstration (Tr. 283-84).

Bates also testified that the commands which Hayes gave were imprecise. The command "don't do it" is confusing. The normal reaction for any individual who received the command that Hayes gave would simply have been to turn around, which was what Parker did. (Tr. 286.) Bates also made the point that Hayes could have retreated to take cover behind the automobile, where he had a clear defensive position (Tr. 295).

Bates testified that any law enforcement program that complied with commonly-accepted standards in this country should have taught the particular tactics which he

described. Any acceptable training program should teach those physical disarming tactics as "continual training." (Tr. 282, 285.)[8]

The Refusal to Retrain or Discipline

Uninvolved officers of the District of Columbia Police Department conducted an investigation of the shooting. They reached the same conclusions as Chief McLaren and Agent Bates.

The investigation was conducted principally by Assistant Police Chief Theodore R. Carr. Assistant Chief Carr served as Administrative Services Officer. (Tr. 913.) It was his responsibility to review cases involving police misconduct, to make findings and to recommend punishment (Tr. 914).

Assistant Chief Carr conducted an official review of Hayes' conduct and made written findings (Plaintiff's Exhibit 40):

> In the evidence amassed concerning this incident, including your latest reply to the Notice of Proposed Adverse Action, you make conflicting statements about Mr. Parker's exact position and actions at the time you fired your revolver. Additionally, you make conflicting statements concerning your specific reasons for utilizing deadly force. In your statement of November 15th, 1982, you state that you had no clear view of his hand but that you thought that Parker was trying to shoot you, the woman, or both. Later, in the same statement you state that Mr. Parker was in the process of entering the vehicle when you fired your first shot and that you fired to protect Ms. Rainford from being kidnapped. In your most recent reply, however, you contend that Mr. Parker

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[8] Petitioner erroneously states that the only alternative that Agent Bates offered to the use of deadly force was a "choke hold" of doubtful legality in the District of Columbia. In fact, Bates was quite clear that there were other physical techniques that Hayes should have used to subdue Parker without resort to his weapon. (*See, e.g.*, Tr. 293.)

was fully out of the car when you fired your revolver at him from a distance of 12 to 18 feet.

Further, you contend that you were towards the rear of the vehicle, at the end of the car. You contend that you believed that Mr. Parker was armed due to his actions and body movements during the incident and your previous knowledge of his criminal history. This claim is inconsistent with the fact that you allowed the individual to enter his bedroom unguarded and to remain there for 15 to 20 minutes.

The facts of this case indicate that you had insufficient information that Mr. Parker was armed at the point you utilized your service revolver. If, as you contend, you were towards the rear of the vehicle, you could have taken cover behind it. However, as the evidence indicates that the center post was struck by one of your rounds, you could not have been directly behind the vehicle and had to be at some angle in respect to Mr. Parker, the open door, and Ms. Rainford.

Additionally, as you contend in your reply that Mr. Parker was completely out of the vehicle, at that point he presented no immediate danger to Ms. Rainford. Consequently, with no facts to establish that Mr. Parker was armed and with Ms. Rainford out of immediate danger, the utilization of your service revolver at that instant was unjustified and endangered Ms. Rainford's life.

Conclusion: This officer concludes that a preponderance of the evidence established that you are guilty of the charges and specifications as cited in the Notice of Proposed Adverse Action.

Decision: For the cited violation, you will be fined three days' pay, amounting to a monetary fine of $318.36. The total fine shall be payable in 12 equal payments of $25 each and one final payment of $18.36, beginning on or after the pay period beginning June 24th, 1984, and continuing thereafter each and every pay period until paid in full, provided that in the event of your separation from the force,

> the total amount of the fine then remaining unpaid shall be retained out of any compensation or allowance due or that may thereafter become due, unless otherwise ordered by the Chief of Police. In the event monies are presently being deducted from your salary as a result of a previously imposed fine, the above fine shall be added to the outstanding balance and the current installment shall remain the same.

(Tr. 917-20.)

Assistant Chief Carr then officially notified Spurlock, the head of the ROP Unit that Hayes should be "recycled through the firearms training course so that any—so he can be refreshed in terms of policies and procedures" (Tr. 920). Spurlock received the notice. He declined to have Hayes retrained in any aspect of firearms training and never sent him to any course. He thought Hayes' conduct was justified and not inconsistent with ROP practice and custom. He tried to help Hayes in administrative proceedings before Assistant Chief Carr. (Tr. 1608, 1609, 1618, 1619.)

Chief of Police Maurice Turner affirmed Assistant Chief Carr's factual findings, but he vacated the penalty (Tr. 921-24). Remarkably, Hayes was neither punished nor retrained.

The Civil Rights Claim

Petitioner's request for review urges that the jury was asked to decide whether the District of Columbia's official policy on the use of deadly force caused a constitutional violation. That is not true. The District's official policy with regard to the use of deadly force was never the basis of Parker's constitutional claim under 42 U.S.C. § 1983. Compare *Tennessee v. Garner*, 471 U.S. 1 (1985).

The essence of Parker's civil rights claim was rather that the District deliberately or recklessly pursued a broad course of conduct that resulted in the deprivation

of his constitutional rights.[9] That course of conduct included (1) the creation of a squad of officers with a mission to engage in high volatility confrontations outside the borders of the District of Columbia, while armed and while seeking out purportedly dangerous persons; (2) advising officers to confront these situations by freelancing their way through them, without any significant command and control from central authorities, without local police presence, without contact with senior personnel, without clear instructions on when "arrests" were permissible, when investigative "detention" was permissible, or when neither was appropriate, without instruction as to the value and need for command presence, and without other guidance normally attending significant police operations in far-flung areas; (3) failing to select and train officers physically fit for the anticipated volatile confrontations and physically able to respond by the use of nondeadly force where such techniques are appropriate; and (4) failing thereafter to retrain or discipline (and indeed praising) an officer found to have wrongly utilized deadly force in one such extra-jurisdictional confrontation—the shooting of Parker.

This conduct reflected deliberate indifference in the extreme by the District of Columbia to the risk of constitutional harm—the unreasonable use of deadly force to finish off a predictably volatile and confusing extra-jurisdictional confrontation between an uncertain and unguided ROP officer and a confused and panicked citizen. It was the clear moving force behind Parker's injury.

The District moved for a directed verdict after Parker rested and again at the end of its defense. With regard to Parker's constitutional claim, it argued that the evidence was not sufficient to establish gross negligence and causation. Both motions were denied.

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[9] Parker alleged deprivation of rights secured to him by the Fourth, Fifth, Eighth and Fourteenth Amendments to the Constitution and by 42 U.S.C. § 1983. Amended Complaint at ¶ 1.

The Jury Instructions

The jury was instructed rigorously and at length regarding the elements of Parker's civil rights claim (Tr. 2220-23). Those instructions included the following language:

> First, in order to find for Don Parker on this issue, you would have to find that Mr. Parker proved by a preponderance of the evidence that the training, supervision and discipline program of the metropolitan police department was inadequate and that the alleged inadequacy of the training, supervision, and discipline program resulted from the selected policy or custom of the District of Columbia policymakers.
>
> To find for Mr. Parker, you would have to further find that if there were a policy or custom of the District of Columbia which resulted in inadequate training, supervision or discipline, that there was a constitutional violation of Mr. Parker's civil rights and that there was a link, that is, a causal connection between the policy or custom concerning the training, supervision and discipline and the constitutional civil right of which he contends he was deprived.
>
> Policy in this context shall be defined as a definite course or method of action selected from among alternatives and in the light of conditions to guide and determine present and future decisions.
>
> * * * *
>
> The burden is on the plaintiff, Don Parker, to establish by a preponderance of the evidence that the District of Columbia failed adequately to train, supervise and discipline Officers Hayes and Motley and that this failure constitutes gross recklessness and gross indifference to the civil rights of Mr. Parker in that such inadequate training, supervision, and discipline would involve a risk of harm to others.
>
> The burden is on the plaintiff, Don Parker, to establish by a preponderance of the evidence that as a result of the inadequate training, instruction and discipline as alleged, Mr. Parker was deprived of his

> civil rights without due process of law, specifically as a result of the unnecessary and unreasonable use of force by Officer Hayes. At the very least, there must be an affirmative link between the policy and the particular constitutional violation alleged. The policy must be the moving force behind the alleged constitutional violation.
>
> Proof of a single incident of unconstitutional activity is not sufficient to impose liability on the District of Columbia unless proof of the incident includes proof that it was caused by an existing unconstitutional District of Columbia policy or custom which policy or custom can be attributed to a District of Columbia policymaker.

(Tr. 2221-23.)

The Jury Verdict

The jury specifically found "that the District of Columbia had a policy, custom or practice which directly resulted in the deprivation of Don Parker's constitutional right without due process of law." It awarded Parker $425,046.67 in damages for the District's violation of 42 U.S.C. 1983. (Tr. 2248-49.) The jury found in favor of the District on Parker's assault and battery claim (Tr. 2248).

The District's motion for judgment notwithstanding the verdict was denied in a reasoned and lengthy opinion (App. 44a-60a).

Affirmance by the Court of Appeals

The District appealed. It again challenged the sufficiency of the evidence as to its conduct and the nexus between that conduct and Parker's injury. The District abandoned on appeal any argument that Inspector Spurlock and Chief Turner were not policymakers and that inadequate training of police officers cannot constitute a policy, practice, or custom under *Monell v. Department of Social Services of the City of New York*, 436 U.S. 658 (1978). Instead, it argued that the evidence was not sufficient to establish inadequacies in training, discipline,

or supervision and that any such deficiences were not the cause of Parker's injuries.

The Court of Appeals affirmed the judgment of the district court essentially because it found "ample evidence in the record" to support the jury's finding that the District had a policy, custom, or practice that directly resulted in the deprivation of Parker's constitutional rights without due process of law (App. 8a). The majority further noted that "[o]ur colleague's dissent is primarily based on his own interpretation of the facts, which is contrary to that of the jury" (App. 5a).

The Court of Appeals held, for two reasons, that reversal was not warranted by the trial court's decision not to charge the jury regarding use of deadly force to prevent flight with language purportedly excerpted from *Tennessee v. Garner*. First, it correctly discerned that "[w]hat the District's *official* policy consists of is not the issue here and is not properly the basis of a jury charge" (App. 13a) (emphasis in original). Second, the Court determined that the District had failed to preserve an objection on the issue (App. 13a-14a).

REASONS FOR DENYING THE WRIT

I. The Court of Appeals Correctly Affirmed the District Court's Refusal to Instruct the Jury That a Police Officer May Use Deadly Force to Apprehend a Person Suspected of a Violent Crime Because (a) the Issue Was Not Presented By the Evidence and (b) the Instruction Requested Did Not Accurately Reflect the Holding of *Tennessee v. Garner*

Petitioner seeks review of the Court of Appeals' affirmance of the district court's refusal to give an instruction containing the following language:

> It is also constitutional for an officer to use deadly force in apprehending a suspect if there is probable cause to believe that the suspect has committed a crime involving the infliction or threatened infliction of serious physical harm if, where feasible, some warning has been given.

(Petition at 9 n.5.) It urges that failure to give this instruction constitutes reversible error because the Court failed to advise the jury of the full range of occasions upon which an officer may constitutionally use deadly force against an unarmed citizen, relying particularly upon this Court's decision in *Garner*.

We demonstrate below that the Court of Appeals' decision represents no departure from *Garner*. The district court correctly declined to instruct the jury in the language requested because (1) the evidence presented no basis for a conclusion that force was necessary to prevent flight, and (2) the instruction would have incorrectly told the jury that Hayes was justified in shooting Parker merely because he was suspected of a crime of violence, regardless of whether Hayes' use of force was necessary to protect his own life or that of another. In Part II, we demonstrate that the Court of Appeals correctly held that petitioner had not preserved the issue for review.

In *Garner*, this Court "determine[d] the constitutionality of the use of deadly force to prevent the escape of an apparently unarmed suspected felon." 471 U.S. at 3. This Court there held that "such force may not be used unless it is necessary to prevent the escape *and* the officer has probable cause to believe that the suspect poses a significant threat of death or serious physical injury to the officer or others." *Id.* (emphasis added)

The petitioner seeks to invoke *Garner* here by stating, "The shooting occurred after Parker, who had stated that he would accompany Officer Hayes and his partner to the police station, decided to flee" (Petition at 2). This sentence misleadingly suggests that Parker was shot while fleeing. In fact, as Hayes testified, Parker was standing still, a few feet away, between Hayes and a parked vehicle, when Hayes shot him. Parker was not fleeing (Tr. 199.) Hayes said he shot Parker because he was afraid Parker would shoot him; he never said he shot to prevent flight. (Tr. 204-05, 213-14, 218.); *see also* Findings of Assistant Chief Carr, reprinted *supra* pp.

12-14.) Hayes never told Parker he was under arrest nor invoked any authority to order him to halt (Tr. 1858-60).

The District conceded this point in its argument in support of its motion for directed verdict. Its counsel said:

> We would submit that there is not—with regard to the question of whether flight is an issue in our defense and our motion here, we would submit that Officer Hayes was not at that time shooting a fleeing felon. There was no intention on the part of the police officers to shoot Mr. Parker as a fleeing felon at any time.

(Tr. at 1488-89).[10] Consistently, later when the District's Inspector Edward Spurlock, head and founder of the ROP unit, testified that "we firmly believe that we should stop fleeing felons in certain situations," counsel for the District told the judge: "That [testimony] was not my expectation. I will not go further on the fleeing felon." (Tr. 1515.)

The trial court was justified in declining to give a "fleeing felon" instruction, half-heartedly requested at the end of the trial, because the District had deliberately shaped its evidence and tried its case on the theory that Hayes believed Parker was about to shoot him. Having explicitly declined reliance on the need to prevent escape, the District could hardly urge an instruction on that theory.

The supposed "*Garner*" instruction tendered by the District, would have been a manifestly incorrect state-

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[10] The District and Parker were in agreement on this point. Plaintiff's counsel had said earlier in opposing the motion for directed verdict: "And it is not Officer Hayes' contention, has not been to this point, that Mr. Parker was about to flee when he shot. This is not a case in which the court is going to be asked to decide the parameters of the fleeing felon rule either for the District of Columbia or the State of Maryland." (Tr. 1478.)

ment of the law in any event.[11] It is not correct, as the proposed instruction stated, that if Hayes knew Parker was suspected of a violent crime, Hayes could constitutionally have shot him after a warning. It is the need to prevent flight which justifies shooting an unarmed suspect of a violent crime. The proposed instruction did not require that the shooting be "to prevent escape," the evidence did not support it, and refusal to give the instruction was correct.

Petitioner argues that it presented evidence of an official policy that "permits the use of deadly force only in the most extraordinary of circumstances," *See* Petition at 5, and that a *Garner* type instruction was necessary to correct a misimpression Chief McLaren created that police may never shoot unless they see a gun. The Court of Appeals understood, however, that Parker did not challenge the official policy:

> The jury was charged with evaluating the adequacy of District police training, supervision and discipline with regard to the use of deadly weapons rather than investigating the official weapons policy of Officer Hayes and the District. The jury arrived at its verdict upon a consideration of the actual customs and policies of the ROP. For this reason, we deem

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[11] The District's proposed instruction appears to have been derived from the following language of this Court's decision in *Garner*:

> Where the officer has probable cause to believe that the suspect poses a threat of serious physical harm, either to the officer or others, it is not constitutionally unreasonable to prevent escape by using deadly force. Thus, if the suspect threatens the officer with a weapon or there is probable cause to believe that he has committed a crime involving the infliction or threatened infliction of serious physical harm, deadly force may be used if necessary to prevent escape, and if, where feasible, some warning has been given.

471 U.S. at 11-12. As the Court can readily see, the District omitted from its proposed instruction, reprinted *supra* p. 18, important language that is intrinsic to the meaning and holding of *Garner*, specifically the words "to prevent escape."

> Judge Green's instructions on the use of excessive force, although not comprehensive, to be sufficient to convey the law of this fact-bound case.

(App. 13a.)

The jury was entitled to look beyond the words of the District's official pronouncements. The fact that the District had articulated a policy does not mean that it had implemented it (or done so effectively).[12] The jury was entitled to believe, on the basis of the evidence presented by plaintiff, that it had not.[13]

The Court of Appeals correctly concluded that the instructions given conveyed the law concerning excessive force applicable to both Parker's common law and constitutional claims (App. 13a, 14a.) Those instructions,

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[12] *See Kibbe v. City of Springfield*, 777 F.2d 801, 808 (1st Cir. 1985) ("If the department recognized the importance of pursuing alternatives to deadly force, as [its] rule indicates, and yet failed to train on any alternative methods of stopping the suspect in a high-speed pursuit, a jury properly could draw the inference that the department made a conscious policy decision not to do such training."), *cert. dismissed*, 480 U.S. 257 (1987).

[13] As noted by the Fifth Circuit, "An injured plaintiff is not likely to document proof of a policy or disposition, either of the policymaker or throughout the police force, that disregards human life and safety. The disposition must be inferred circumstantially from conduct of the officers and of the policymaker." *Grandstaff v. City of Borger*, 767 F.2d 161, 171 (5th Cir. 1985), *cert. denied*, 480 U.S. 916 (1987). The District of Columbia Circuit has recognized that "[p]olice misconduct cases such as this one . . . do not involve express statements of policy . . . To succeed, a plaintiff must show a course deliberately pursued by the city . . ." *Carter v. District of Columbia*, 795 F.2d 116, 122 (D.C. Cir. 1986).

Moreover, a policy that is not itself unconstitutional may, nonetheless, provide the basis for municipal liability under Section 1983. *Fiacco v. City of Rensselaer*, 783 F.2d 319, 327 (2d Cir. 1986), (relying on plurality opinion in City of *Oklahoma City v. Tuttle*, 471 U.S. 808 (1985)), *cert. denied*, 480 U.S. 922 (1987). In *Fiacco*, the court rejected the argument that "a municipal policy that is not itself unconstitutional but that merely permits or tolerates unconstitutional acts by city employees cannot be the basis for municipal liability under § 1983." 783 F.2d at 326.

which were never assigned as error by the District, correctly stated the reasonableness standard articulated by *Garner* (Tr. 2219-20, 2222-23).[14]

McLaren did not testify to any different standard. He testified that, in his opinion, Officer Hayes' use of deadly force was not reasonable under the circumstances because there was no immediate threat against Officer Hayes' life or against the life of the driver in the car. (Tr. 691.) His views on the question, like Lieutenant Carr's, were substantially affected by the fact that Hayes never saw a weapon (Tr. 691-92, 919). The District's expert witness, Glen R. Murphy, on the other hand, testified that Hayes' use of deadly force was reasonable, not to prevent flight but to prevent harm under the circumstances, and that it was not necessary for Hayes to see a weapon before shooting Parker (Tr. 1934).

The trial court clearly instructed the jury on the manner by which to evaluate the conflicting testimony of these experts on the issue (Tr. 2216), and the jury did so. Petitioner's contention that the district court should have told the jury Hayes could shoot Parker because he was wanted for a crime of violence is a gross misconstruction of the constitutional principle articulated in *Garner* and deserves no further consideration.

II. The *Garner* Instruction Issue Was Not Preserved and the Court of Appeals' Application of Federal Rule of Civil Procedure 51 Does Not Warrant Review

The Court of Appeals panel correctly held that petitioner failed to preserve an objection to the trial court's refusal to give an instruction supposedly based on *Garner* (App. 13a). The Court of Appeals' conclusion is entirely consistent with the clear directive of Rule 51:

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[14] The trial court properly instructed the jury that Parker had to prove Hayes' use of deadly force was unreasonable in order to prevail on his Section 1983 claim. (Tr. 2223, reprinted *supra* at 16-17.) Compare *City of Los Angeles v. Heller*, 475 U.S. 796 (1986).

> No party may assign as error the giving or the failure to give an instruction unless the party objects thereto before the jury retires to consider its verdict, stating distinctly the matter objected to and the grounds of the objection.

Fed.R.Civ.P. 51. The District did not object, either specifically or generally, to Judge Green's refusal to give its proposed instruction before the jury retired to consider its verdict. Nor did it assign it as a basis for reversal in the Court of Appeals.

Indeed, the District thought so little of this argument that it did not raise the issue on appeal. *See* Statement of Issues Presented for Review in Brief for Appellants at 1-2, reprinted in Appendix hereto. The first time it mentioned the denial of the proposed "*Garner*" instruction was in a footnote in its Reply Brief. Even then, however, the District did not assign it as a basis for error. Only after Judge Williams dissented in the Court of Appeals, in part on the ground that "the *Garner* error calls for reversal", did the District elevate the denial of its proposed instruction to an issue requiring review.

The District suggests that it attempted to repeat an objection to the Court's refusal of its "*Garner*" instruction before the jury retired but was prevented from doing so by the district judge. The District did attempt "to reiterate an objection" after the jury was instructed, but that objection had nothing to do with *Garner*. *See* Petition at 10. The objection counsel for the District then sought to make was "with regard to the administrative rulings," a reference to the internal disciplinary proceeding against Officer Hayes by the metropolitan police department. (Tr. 2230-31.)

Counsel's comments, made during the in-chambers discussion of jury instructions before the jury was charged,[15] did not rise to the level of an objection within

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[15] Counsel for the District had made no mention whatsoever of her proposed "*Garner*" instruction at the previous in-chambers conference on jury instructions (Tr. 2070-80).

the meaning of Rule 51. During the pre-charge conference, counsel suggested, notwithstanding the absence of evidence that Hayes shot Parker to prevent flight, that the District would like the jury to be told of the *Garner* "fleeing felon" principle.

> And I would suggest that the court consider adding somewhere in that portion of the instructions at least the second paragraph of our proposed instruction no. 4, and would ask that you do so in particular light of counsel's arguments yesterday giving an erroneous statement of the law to the jury with regard to *Tennessee v. Garner*. I think it's important, in light of these instructions, that the jury know that it would not be unconstitutional for a police officer to shoot a fleeing felon, or to shoot somebody—to apprehend somebody. And I think that that's a significant factor. I think the language is too vague as to what in fact the constitutional violation is. And we would submit that on those bases, at least, the instruction is not satisfactory. And if the court would consider paragraph 4, we would appreciate that.

(Tr. 2196.) A request to give an instruction is not equivalent to an objection to a refusal to give an instruction. *Johnson v. Houser*, 704 F.2d 1049, 1051 (8th Cir. 1983).

Moreover, a judge's comments, such as "that will make an interesting appeal," do not preserve an issue for appeal. *See Dunn v. St. Louis-San Francisco Ry. Co.*, 370 F.2d 681, 684 (10th Cir. 1966) ("[w]e warn counsel that even if the district court acquiesces in a procedure which is insufficient, a party may find that his rights have not been preserved").

The Court of Appeals' faithful application of Rule 51 in this case does not warrant review. Appellate court decisions construing Rule 51 demonstrate that whether an issue is preserved for appeal is necessarily fact-intensive and specific to the circumstances of each case. *See, e.g., Fischer v. Dallas Federal Sav. and Loan Ass'n.*,

835 F.2d 567, 569-70 (5th Cir. 1988) (failure to object to charge before jury retired barred consideration of the issue on appeal); *Murphy v. Owens-Illinois, Inc.*, 779 F.2d 340, 345-46 (6th Cir. 1985) (error not preserved for appeal where counsel objected to instruction in pre-charge conference but not after the jury was charged); *Spanish Action Committee of Chicago v. City of Chicago*, 766 F.2d 315, 318-19 (7th Cir. 1985) (objection to original proposed instruction did not constitute timely objection to amended instruction under Rule 51); *Klapmeier v. Telecheck International, Inc.*, 482 F.2d 247, 255 (8th Cir. 1973) (appellants were required under Rule 51 to object to instruction after jury was charged in order to preserve error, even though trial court had denied appellants' requested instruction); *United States v. Heyward-Robinson Co.*, 430 F.2d 1077, 1083-85 (2d Cir. 1970) (appellants' failure to object to five of seven claimed errors in charge before jury retired precluded raising them on appeal), *cert. denied*, 400 U.S. 1021 (1971); *See also Dunn v. St. Louis-San Francisco Ry. Co.*, 370 F.2d at 684 (requiring strict compliance with Rule 51).

III. The Court of Appeals' Decision Is Entirely Consistent With This Court's Decisions in *Monell v. Department of Social Services of the City of New York, City of Oklahoma City v. Tuttle, and Pembaur v. City of Cincinnati,* and Presents No Issue Requiring Determination By This Court

In the trial court, in the Court of Appeals, and even now, petitioner concedes that this Court's decisions in *Monell* and *Tuttle* concerning municipal liability under 42 U.S.C. § 1983 govern this case. As reflected in the jury instructions, the district judge was painstaking in her adherence to and invocation of these decisions (*see also* Tr. 2070-80, 2190-97). The instructions accurately reflect the governing law and did not, as petitioner contends, "permit liability to be imposed on a constitutionally untenable theory." *See* Petition at 20.

Petitioner has not challenged those instructions on appeal. It does not, therefore, ask this Court to impose here a standard greater than the one to which it agreed below. *Cf. City of Springfield v. Kibbe*, 480 U.S. 257, ——, 107 S.Ct. 1114, 1115 (1987) (This Court "ordinarily will not decide questions not raised or litigated in the lower courts," and this general rule "has special force where the party seeking to argue the issue has failed to object to a jury instruction.")

Although presented as a criticism of the Court of Appeals' analysis and "rulings," the final question for which the petition seeks review is actually a challenge to the sufficiency of the evidence. The sufficiency of that evidence has been examined four times—twice by the trial judge in ruling upon the motions for directed verdict, once by the trial judge in ruling on the motion for judgment notwithstanding the verdict, and again by the Court of Appeals. The general rule of this Court is "we do not grant a certiorari to review evidence and discuss specific facts." *United States v. Johnston*, 268 U.S. 220, 227 (1925); *Torres-Valencia v. United States*, 464 U.S. 44, 45 (1983) (Rehnquist, J., dissenting).

This case does not present any issue important to this Court's determination of the parameters of municipal liability under 42 U.S.C. § 1983. The District of Columbia was not held liable for Parker's injuries under an impermissible theory of *respondeat superior*. *See Monell*, 436 U.S. at 691. The jury was not permitted to find liability for inadequate training based upon one isolated incident of police misconduct. *Cf. Tuttle*, 471 U.S. at 823-24. As noted by the Court of Appeals,

> "[u]nlike *Tuttle*, this case does not involve a single incident that gives rise to an inference of inadequate training. It involves a sad series of mishaps linked to a policy of sorely deficient training, supervision and discipline."

(App. 6a.) The jury was not allowed to find the city liable for mere negligence, but was required to apply a

much higher standard. *Cf. Kibbe*, 480 U.S. at 257. The burden of proof was not shifted to the District to prove the adequacy of its training, but was placed firmly upon Parker to prove that the District's failures constituted gross recklessness and gross indifference to his civil rights. *Cf. Harris v. Cmich*, No. 85-3314, slip op. at 6 (6th Cir. July 2, 1986), *cert. granted sub nom. City of Canton v. Harris*, 108 S.Ct. 1105 (1988). In sum, this case does not present any significant question of public import under 42 U.S.C. § 1983 requiring intervention or clarification by the Supreme Court.

There is not a serious question as to whether Parker demonstrated municipal responsibility for the conduct which caused his injuries.[16] This case is controlled on the facts by *Pembaur v. City of Cincinnati*, 475 U.S. 469, 106 S.Ct. 1292 (1986), a decision not referred to in the petition. In that case, this Court upheld the liability of a county for an illegal search conducted by police officers acting under instructions from the sheriff and county prosecutor, and explained why the result was consistent with *Monell*. *"Monell,"* it said, "is a case about responsibility." 475 U.S. at ——, 106 S.Ct. at 1297. The core of the *Monell/Tuttle* analysis is that plaintiffs must demonstrate conduct by the municipality, and not merely by its employees, "and thereby make clear that municipal liability is limited to action for which the municipality is actually responsible." *Pembaur*, 475 U.S. at ——, 106 S.Ct. at 1298.

Municipal responsibility is precisely what Parker proved. His injuries were caused, as in *Pembaur*, not by a low-level decision by a desk officer or street policeman on routine patrol. They were caused by conduct which was the deliberate and conscious choice of police depart-

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[16] The jury was properly instructed with both the language "moving force" and "affirmative link." *See Monell*, 436 U.S. at 694; *Tuttle*, 471 U.S. at 823. Causation is an issue of fact for the jury's determination. *See Morgan v. District of Columbia*, 824 F.2d 1049, 1063 (D.C. Cir. 1987).

ment officials actively making policy[17] for the District of Columbia. Although Officer Hayes' hand was on the gun, the District of Columbia was just as responsible for Parker's injuries as if those officials had ordered Hayes to shoot. The uncontested evidence presented at trial was that Chief Turner gave Inspector Spurlock full authority to organize, design, and set policy for the ROP squad. Inspector Spurlock proudly took responsibility and credit for the unit and for the Parker shooting in particular. (Tr. 1620-22.)

Respondent is aware that this Court has granted certiorari, without opinion, and heard argument in *City of Canton v. Harris*, No. 86-1088. *See City of Canton v. Harris*, 108 S.Ct. 1105 (1988) (granting petition for writ of certiorari). The successful petition in that case raises the question whether inadequate training can be a "policy or custom" of a city within the meaning of *Monell*, without independent evidence that the city knew or should have known that the training was inadequate and therefore that violations of constitutional rights might foreseeably result from any inadequate training. Petition for Writ of Certiorari, *City of Canton v. Harris*, No. 86-1088 (U.S., filed Jan. 2, 1987). Although it involves inadequate training, *Harris* is very different from this case. The City of Canton was held liable under 42 U.S.C. § 1983, for the actions of the admitting officer of the city's jail, who had discretionary authority to arrange for special medical care for an arrestee, but who did not receive specialized medical training to detect potential mental illness in an arrestee. That one, rather narrow failure of a municipality to train does not approach the magnitude or seriousness of the conduct of the District of Columbia in this case.

Respondent does not believe that this case would be decided differently even if the Court resolved the issue in

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[17] Petitioner did not contest on appeal that Parker had proved involvement of "policymakers" for purposes of § 1983.

favor of the petitioner in *Harris*. For reasons already described, the evidence in this case demonstrated municipal responsibility far more egregious than a mere failure to train. We respectfully disagree, therefore, that this case should be held pending decision in *Harris*.

CONCLUSION

This Court should deny the petition for writ of certiorari.

Respectfully submitted,

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APPENDIX

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UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 87-7039

DON R. PARKER, *et al.*,
Appellees,

v.

WILLIAM HAYES, *et al.*,
Appellants.

On Appeal from the United States District Court
for the District of Columbia

BRIEF FOR APPELLANTS

STATEMENT OF ISSUES PRESENTED FOR REVIEW

Under *Monell v. Department of Social Services of the City of New York*, 436 U.S. 658 (1978), a municipality may be held liable pursuant to 42 U.S.C. section 1983 only if it establishes a "policy" or "custom" that "causes" a person's constitutional rights to be violated. In this case, the District of Columbia was held liable under *Monell* for injuries suffered by a suspected felon who was shot by a District police officer in Maryland after he attempted to "hijack" a passerby's automobile with the

driver inside and after it appeared that he was reaching for a weapon.

The issues presented for review are:

I. Whether the failure of the police officer to arrest the suspected felon before his attempt to "hijack" the automobile, even if pursuant to an inadequate District training program, can constitute a District policy or custom that caused a violation of the suspected felon's constitutional rights?

II. Whether the District may be held liable for injuries stemming from the shooting because it did not have a policy that prohibited its police officers from using deadly force unless and until they see a weapon, even though the District's policy on the use of deadly force satisfies constitutional requirements?

III. Whether the District can be held liable for injuries stemming from the shooting on a theory of inadequate training in alternative methods to the use of deadly force, when the plaintiff did not even attempt to establish what the District's training program was and when the plaintiff failed to establish that the District's training program was grossly negligent or even negligent in the case of the police officer who fired the shot?